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In the Supreme Court of the United States

October Term, 1981

No. 82-

JAMES MARTIN SMITH,

Petitioner

vs.

DOUGLAS GONZALES, et. al.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution.

2. Whether the admission into evidence of polygraph test results, over objection, prejudicially impeaches the credibility of the adverse party in a civil trial in violation of his rights to due process and trial by jury, and contravenes the Federal Rules of Evidence.

PARTIES TO PROCEEDING

All parties to the proceeding in the court below were James Martin Smith, petitioner at bar, Thomas P. Lane, respondent at bar, Ossie Brown, a district attorney, and the honorable Douglas M. Gonzales, a judge.

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The petitioner respectfully requests that this Court grant his petition for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Court of Appeal's opinion in this case is found at 670 F 2d 522 (C.A. 5 1982).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY PROVISION INVOLVED

The statute involved in this case is 42 U.S.C. Section 1983.

QUESTIONS PRESENTED

1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution.

2. Whether the admission into evidence of polygraph test results, over objection, prejudicially impeaches the credibility of the adverse party in a civil trial in violation of his rights to due process and trial by jury, and contravenes the Federal Rules of Evidence.

STATEMENT OF THE CASE

Petitioner filed this action, *pro se*, on April 10, 1978 pursuant to 42 U.S.C. Section 1983 alleging several violations of his constitutional rights involving two arrests, detention, and excessive bail. Named as defendants were Judge Gonzales, District Attorney Brown, and deputy Sheriff, Thomas P. Lane, respondent herein. Gonzales and Brown were dismissed under the absolute immunity doctrine. On October 16, 1980, prior to trial, petitioner filed his Motion In Limine requesting, *inter alia*, the exclusion of polygraph test results, which respondent indicated in his pretrial order that he intended to offer into evidence. The trial court admitted the polygraph test results over the objection of the petitioner. The jury rendered a verdict for respondent, and the district court dismissed the case on October 28, 1980. Notice of Appeal was filed on November 25, 1980, and the Court of Appeals for the Fifth Circuit affirmed the decision on March 15, 1982. Petitioner filed his "Suggestion for Petition for Rehearing En Banc" on April 12, 1982, after extension, and the Court issued its final decision denying the petition on April 26, 1982, treating the "Suggestion for Petition for Rehearing En Banc" as a "petition for panel rehearing".

The petitioner is a citizen of the United States and the State of Louisiana. He is the father of four children, one of whom, Shirley, was engaged to be married to Steve McDowell, whom petitioner employed in his aluminum products business. Petitioner had given Shirley permission to marry Steve and had undertaken preparations for the wedding. Upon receipt of a complaint from a customer that Steve was using drugs on the job, petitioner fired him. Shirley became upset, believing the wedding plans were off, and ran away with Steve. The next day petitioner located Shirley and Steve at Steve's parents house, and an altercation resulted. Police were summoned including the respondent, an investigation occurred, and the matter was closed as a family dispute with no one being charged with any criminal violation, although the petitioner attempted to obtain an arrest warrant against Steve for an assault. The same day respondent assisted Shirley in obtaining a coroner's warrant for the petitioner's involuntary commitment to a psychiatric facility for four days. The following day, the respondent, acting solely on a "hunch," and without probable cause, called Shirley to his office and began interrogating her on an alleged incestuous relationship with petitioner, which Shirley denied again and again. Finally, respondent threatened Shirley with an arrest for incest, and Shirley "admitted" the relationship. Respondent subsequently brought Shirley to the prosecutor's office to be interviewed by prosecutor Michael Ponder. At the meeting, respondent did not inform Mr. Ponder of the following facts:

1. That he had threatened Shirley with arrest for incest;

2. That petitioner had given permission to Shirley to marry Steve, and had undertaken preparations for the impending wedding;

3. That Steve and Shirley had smoked marijuana on occasion, and petitioner prohibited his children from using drugs;

4. That respondent had interrogated Shirley based solely on a "hunch," and that there existed no probable cause when respondent undertook his investigation.

After the meeting, Mr. Ponder, based on what he was told by Shirley and respondent, caused an arrest warrant to be issued against petitioner on the charge of incest. Respondent arrested petitioner on the charge at the psychiatric hospital facility and booked him at the East Baton Rouge Parish Jail. Bail was set at $100,000, and while petitioner was attempting to raise the bond, respondent went to Judge Gonzales, *ex parte*, informed the judge of hearsay threats petitioner allegedly made at the jail, and told the judge that petitioner was a "dangerous man". Judge Gonzales reset the bail at $250,000 which bond petitioner could not make. Ten days later bond was reduced to $50,000 by Judge Parker and petitioner made bond and was released. On the same day Shirley and Steve were married in the presence of relatives and respondent served as "best man".

Four months later on October 21, 1977 a preliminary hearing was held for petitioner on the incest charge. Prior to the scheduled preliminary hearing, petitioner was again arrested by respondent on October 9, 1977 on a charge of carnal knowledge, which he procured from a lengthy interview with a girlfriend of Shirley's, and this arrest was made known to the Court by respondent at the preliminary hearing. The Court found probable cause, in part due to the second charge on carnal knowledge.

A polygraph test was given to Shirley on January 19, 1978, and the examiner set forth four questions in a written report and concluded that Shirley's answers "showed definite indications of truthfulness." Petitioner was acquitted on the incest charge after trial on February 21, 1978 and the carnal knowledge charge was dropped. In the words of Mr. Ponder at trial, the charge was dropped because the prosecutor's office "didn't want to harrass Mr. Smith any further on any other charge".

At the trial of this case, Mr. Ponder testified on cross examination about the polygraph test as follows:

Q: So the polygraph test had nothing to do with the finding of probable cause, did it, Mr. Ponder?

A: No sir, it wasn't available at that time.

Q: So it had nothing to do with the finding of probable cause, did it Mr. Ponder?

A: Not on the arrest warrant, no sir.

Concerning the issuance of the arrest warrant, Mr. Ponder testified that he was unaware and was never informed that respondent had threatened Shirley with prosecution for incest, which he said was legally incorrect, and testified that had he known this fact it "would have made a difference in the issuance of the arrest warrant". Ponder also testified that he was not informed that petitioner had given permission to marry Steve, that petitioner had made preparations for the impending marriage, and that Steve and Shirley had used illegal drugs on occasions. Ponder also was unaware that respondent conducted his investigation based solely on a "hunch".

The first preliminary hearing was continued because of a breakdown in the recording equipment.

The Court of Appeals for the Fifth Circuit affirmed the jury verdict of the District Court holding that the prosecutor issuing the arrest warrant broke the causal chain and insulated the respondent from liability. The Court further held that since the arrest warrant was facially valid, the Section 1983 claims preceding the arrest warrant should have been dismissed and the fact the polygraph tests results were admitted into evidence over objection constituted harmless error. The Court assuming *arguendo* the existence of malice, did not consider relevant the malicious intent of the respondent and the lack of probable cause in securing the arrest warrant against the petitioner based upon *Rodrigues v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977) (en banc). This holding is in direct conflict with at least three other circuits, *Smiddy v. Varney*, 665 F. 2d 261, 267 (9th Cir. 1981); *Ames v. United States*, 600 F. 2d 183, 185 (8th Cir. 1979); and *Dellums v. Powell*, 566 F. 2d 167, 192 (D.C. Cir. 1977). The Court treating the admission of the polygraph tests results as "harmless error" conflicts with federal court of appeals decisions and state supreme court decisions addressing polygraph test results.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE PROPER INTERPRETATION OF QUALIFIED IMMUNITY UNDER 42 U.S.C. SECTION 1983 FOR A POLICE OFFICER WHO

MALICIOUSLY OBTAINS A FACIALLY VALID ARREST WARRANT FROM A PROSECUTING ATTORNEY.

In *Smiddy v. Varney*, 665 F. 2d 261, 267 (C.A. 9 1981) the Court held that

> "Thus we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." Accord: *Ames v. United States*, 600 F. 2d 183, 185 (C.A. 8 1979); *Dellums v. Powell*, 566 F. 2d 167, 192 (D.C. Cir. 1977).

These decisions conflict with the Fifth Circuit's holding in *Rodriguez v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977) (en banc), *cert. denied* 434 U.S. 1047 (1978), and in *Smith v. Gonzales*, 670 F. 2d 522 (5th Cir. 1982). The Fifth Circuit made no exception for the malicious conduct of the respondent and the misleading information given to the prosecutor, Mike Ponder, in obtaining the arrest warrant. The Fifth Circuit's opinion failed to account for these facts in rendering its decision, instead absolutely immunizing the police officer and as such there exists a conflict between circuits on this holding.

The facts adduced at trial on cross examination of Mr. Ponder establish that Mr. Ponder was never informed that the respondent interviewed the complaining witness solely on a "hunch", and without probable cause; and that in order to obtain an admission of incest from the complaining witness, the respondent informed her that she could be prosecuted for incest, after the complaining witness had denied the incestuous relationship repeatedly prior to the prosecution's threat. Mr. Ponder testified at trial that such a statement by the respondent is "incorrect as a matter of Law", and had he been aware of such a statement, that it "would have made a difference" in his decision to issue the arrest warrant.

Mr. Ponder also testified that at the time of issuing the arrest warrant, he was not informed that petitioner had given his

daughter permission to marry, and had bought wedding gifts for the impending marriage, which would argue against any incestuous relationship. Finally, Mr. Ponder testified that Shirley's desire to marry Steve over her father's objection, and fearing the marriage was off, would have been reason to concoct the incest story.

Petitioner believes that the evidence reflects malicious acts on behalf of the respondent, and the Court below so assumed. These malicious acts rebut the prosecutor's independent judgment, particularly the threat to prosecute the complaining witness for incest. Other facts which reflect the respondent's state of mind where he was "out to get" the petitioner include the respondent going to the judge ex parte, after bail was set at $100,000, and informing the judge of hearsay threats and that the petitioner was a "dangerous man". Bail was then raised to $250,000. The respondent also served as best man at petitioner's daughter's wedding.

The Court did not consider the issue whether the arrest warrant was tainted in its issuance, relying upon *Rodriguez, supra*, in *toto*, which holding has no exception for the officer who maliciously procures a facially neutral warrant. See 670 F. 2d at 526. Were this case heard in either the District of Columbia, the Eight or Ninth Circuits, the results would have been different.

The Court of Appeals held that no constitutional right of the petitioner was violated because the arrest was made under a "properly issued arrest warrant", relying upon *Baker v. McCollan*, 443 U.S. 137 (1979). In *Baker v. McCollan*, *supra*, this Court found no violation of 42 U.S.C. Section 1983 because the sheriff did not cause "the plaintiff to be subjected to deprivations of his constitutional rights", 443 U.S. at 142, but the deprivation was caused by mistaken identity after a valid arrest warrant was obtained, and probable cause existed. Here, the petitioner is attacking the arrest warrant procured maliciously by respondent; petitioner's liberty was restrained by the respondent without due process of law in violation of the Constituion. Unlike the other circuits, the Fifth Circuit fails to distinquish between intervening and interdependent causes. When a maliciously procured arrest

warrant and prosecution occurs, the decisions of the prosecutor, magistrate, grand jury, and trial judge could be proven interdependent. In the Fifth Circuit, however, the police officer would be absolutely immune regardless of evidence proving the causative role of the officer's malicious acts.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE ADMISSIBILITY OF POLYGRAPH TEST RESULTS, AND THE EFFECT OF THOSE RESULTS UPON ALL ISSUES PENDING BEFORE THE JURY.

The district court, over objections by petitioner, permitted the admission of polygraph test results for the reason of establishing the respondent's probable cause for the arrest. Petitioner believes that the evidentiary ruling by the district court, and the affirmance of that decision by the Court of Appeals for the Fifth Circuit conflicts with all legal precedent on the subject, particularly those circuits which hold polygraph test results to be *per se* inadmissible. *U.S. v Bowers*, 534 F. 2d 186 (10th Cir. 1976); *U.S. v Ameral*, 488 F. 2d 1148 (9th Cir. 1973); *People v. Leone*, 25 N.Y. 2d 511, 255 N.E. 2d 696, (C.A.N.Y. 1969); *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *People v. Anderson*, 637 P. 2d 354, (S.C. Colo. 1981) *en banc*, *Marks v. United States*, 260 F. 2d 377 (10th Cir. 1958), cert. denied, 358 U.S. 829 (1959). Federal Rules of Evidence, Rules 401, 402, 403.

The admission of the polygraph test results prejudiced the credibility of the petitioner on all issues before the jury. The Court of Appeals did not address the polygraph issue, instead holding that under *Rodriguez v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977), (en banc), the claims pertaining to the admission of the polygraph test results should have been dismissed. The Court noted in a footnote that polygraph tests results are inadmissible, but did not comment on the prejudicial effect of the polygraph test results on petitioner's case before the jury. The credibility of the petitioner was adversely affected by the admission of the polygraph test results. Petitioner submits that the admission of the test results cannot be directed, especially at the appellate stage, at one or more issues before a jury, but adversely affects

the entire trial on all issues.

The Court of Appeals did not directly address the issue of the admissibility of the polygraph test results because it believed that reaching the issue was unnecessary. In so doing, the Fifth Circuit departed from the rule in other circuits that polygraph examinations so adversely affect a jury's weighing of credibility that the test results are *per se* inadmissible. Now, the Fifth Circuit has carved out an exception that allows admission into evidence of the polygraph test results so long as the relevant substantive claim is not a basis for liability. This separation by claim of polygraph admissibility is both unworkable and unrealistic. Petitioner's rights to a fair jury trial were abridged by this ruling.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William H. Cooper, 5551 Corporate Blvd., Suite 1-H, P.O. Box 14647, Baton Rouge, LA 70898 this 23 day of July, 1982. I further certify that all parties required to be served have been served.

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